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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-120

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN LINEN SUPPLY COMPANY and
TEXAS SANITARY TOWEL SUPPLY CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

Respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit (opinion reported 534 F.2d 585).

I. QUESTION PRESENTED

Petitioner has revised its Question Presented in its latest Brief to this Court. Unfortunately, however, Petitioner continues to ignore the critical fact that the Trial Court entered its Judgments of Acquittal pur-

suant to Rule 29(c), Federal Rules of Criminal Procedure. The Question Presented, properly stated, is:

> "Does the Double Jeopardy Clause preclude an appeal of an acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure, which was entered after the jury was unable to reach a verdict?"

II. STATEMENT OF THE CASE

The Government charged that Respondents were in criminal contempt of an antitrust consent decree. This case was tried to a jury. After both sides had rested, the jury began its deliberations but could not agree on a verdict as to either Respondent. It reported to the Trial Court that it was hopelessly deadlocked. The Trial Court orally discharged the jury and stated to the parties that he was "open to any motions that either side would like to file". (A. p. 33) Pursuant to Rule 29(c), Federal Rules of Criminal Procedure, Respondents timely filed their respective Motions for Judgment of Acquittal. The Trial Court granted Respondents' motions and found the Respondents "not guilty" of the charges against them. (Pet. App. p. 41a, 43a) In its "Judgment(s) of Acquittal" the Trial Court expressly held that (1) the Respondents' Motions were "timely filed at the close of all the evidence", (2) "the Government has failed to prove the material allegations beyond a reasonable doubt" and (3) Respondents "should be found not guilty". (Pet. App. p. 40a-43a)

The weight of Petitioner's evidence is immaterial to this appeal. The sole issue is whether the Trial Court's Judgments of Acquittal are reviewable. In

fact, Petitioner's evidence was so sparse that the Trial Court observed:

> "I'll be frank with you, gentlemen. I almost instructed a verdict for all Defendants in this case. I almost granted a judgment for the Defendants. . . . I have seen some contempt cases, but this is without a doubt the weakest I've ever seen." (A. p. 30)

Moments later, the Trial Court observed further:

> "I just don't see how in this particular instance that this proof would show criminal intent or contumacious acts under this consent decree." (A. p. 32)

III. SUMMARY OF ARGUMENT

A Rule 29 Judgment of Acquittal is an integral part of the trial and was *the* final judgment terminating this trial based on the evidence adduced at the trial and the finding that the Defendants were not guilty. A reversal of that Judgment would require a second trial putting the Respondents in jeopardy a second time for the same offense. A second trial here would violate the Double Jeopardy Clause as interpreted in the holdings of this Court and those of the Second, Fifth and Sixth Circuits.

IV. ARGUMENT

Petitioner's Brief simply ignores the central issue in this case and postulates that the Trial Court cannot enter a judgment of acquittal based on the evidence. Actually, the only issue before the Court is whether the Fifth Amendment to the United States Constitution prohibits a review of the Trial Court's Judgments of Acquittal.

The Constitution provides that "... [n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb". The Government seeks the opportunity to reverse the Trial Court's acquittal and to re-try the Respondents for the same offense.

A. A Rule 29 Judgment of Acquittal Is a Continuation of the Trial Proceeding

Jeopardy attached as to Respondents when the jury was impaneled and sworn. *Downum* v. *United States,* 372 U.S. 734 (1963).

Despite Petitioner's argument to the contrary, Respondents' trial terminated with the entry of *Judgments of Acquittal,* not a mistrial. Similarly in *Fong Foo* v. *United States,* 369 U.S. 141, 143 (1962), this Court said:

> "The trial did not terminate prior to the entry of judgment, as in Gori v. United States, 367 U.S. 364. It terminated with the entry of a final judgment of acquittal as to each petitioner."

Each judgment specifically stated that Petitioner had failed to carry its burden and that the respective Respondent was *"not guilty."* (Pet. App. p. 40a-43a) As Petitioner observed, "terminations called 'mistrials' may or may not be final". (Pet. Brief p. 18) In this case, the Trial Court's oral order of mistrial was not final, nor was it so intended. The Trial Court expressly indicated that thereafter he would entertain motions from either side. (A. p. 33)

Respondents filed and the Trial Court granted the Motions for Judgment of Acquittal pursuant to Rule 29(c). *United States* v. *Martin Linen Supply Co.,* 534 F.2d 585, 587 (5th Cir. 1976). Rule 29 empowers the

Trial Court to grant a Defendant's Motion for Judgment of Acquittal which may be made (1) at the close of the evidence, (2) while the jury deliberated or (3) within seven days after a guilty verdict or the jury is unable to reach a verdict. Thus, Rule 29 extends the time of the trial through the determination of a Motion for Judgment of Acquittal which is made within seven days after a guilty verdict or the jury's dismissal. In this way, Rule 29 gives the Trial Judge flexibility in handling a criminal trial and in insuring justice, and his judgment of acquittal becomes the final judgment terminating the trial. Petitioner ignores the fact that under Rule 29 entry of the Court's judgment of acquittal is part of the trial.

The Trial Court's granting of Respondents' Motions had the same effect as if, pursuant to Rule 29(a), he had ordered an acquittal before the jury had retired.

Petitioner argues that it is immaterial that the Trial Court labeled his order an "acquittal". Regardless of the semantics, the Trial Court's action was an "acquittal" in substance as well as form. Rule 29 grants to the Trial Court the power to enter a "Judgment of Acquittal" within specified time limits. The express finding that the Respondents are *NOT GUILTY* based on the full record adduced at the trial makes the Trial Court action an acquittal in substance as well as form. Under Rule 29, the instant case terminated in an acquittal not a mistrial. 534 F.2d at 588. Thereafter the Double Jeopardy Clause bars a second trial.

Petitioner apparently feels that the Government's "right" to a jury trial overrides the Fifth Amendment's guarantee against Double Jeopardy. However, this is not the law.

One of the great ironies of this case is that the Government seeks to compel a second trial of this case when the Trial Court has found that Respondents have not flouted or denigrated the power of the Trial Court. The Government seeks to punish the contempt of the Trial Court, despite the same Trial Court's holding that no contempt has occurred.

B. The Trial Court's Judgment of Acquittal Was Proper and, Under the Authorities, Is Not Appealable

This Court recognized the power of the Trial Judge, under Rule 29, to make factual determinations in a jury trial in *United States* v. *Sisson*, 399 U.S. 267 (1970). In *Sisson*, the jury had returned a guilty verdict and the Trial Court entered an Arrest of Judgment pursuant to Rule 34, Federal Rules of Criminal Procedure. Writing the opinion of the Court, Mr. Justice Harlan observed:

> "... [I]n this case it was the judge—not the jury—who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29." 399 U.S. at 290.[1]

The Double Jeopardy Clause bars a review of the Trial Court's factual determination of acquittal be-

[1] This is also the Fifth Circuit's holding in this case. In the opinion below, the Fifth Circuit stated:

> "The Government argues that its right to insist on a jury trial would be abridged if this Court views the proceedings below as if they were the result of a bench trial. This assertion ignores, however, the fact that whether the trial is to a jury or to the court, if the evidence is deemed insufficient to support a verdict or finding of guilty the court must grant a directed verdict of acquittal. *United States* v. *Martinez*, 5 Cir. 1973, 486 F.2d 15, 23." 534 F.2d at 588, n. 6.

cause (1) jeopardy attached, (2) the first trial terminated in acquittal and (3) a second trial would twice put the Respondents in jeopardy for the same offense.

This Court's holdings in *Fong Foo* v. *United States, supra,* and *United States* v. *Jenkins,* 420 U.S. 358 (1975), dictate the inescapable result of this appeal. Mr. Justice Marshall summarized the facts and holding of *Fong Foo* when he wrote:

> "In Fong Foo the trial court had interrupted the Government's case and directed the jury to return verdicts of acquittal as to all the defendants. This Court held that even if the District Court had erred in directing the acquittal, the Double Jeopardy Clause was offended 'when the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense.' Id., at 143. *The Court noted that although retrial is sometimes permissible after a mistrial is declared but no verdict or judgment has been entered, the verdict of acquittal foreclosed retrial and thus barred appellate review.*" *United States* v. *Wilson*, 420 U.S. 332, 347-48 (1975) (emphasis added).

In a footnote, Petitioner argues that since "[d]irected [v]erdicts were abolished" by Rule 29(a), *Fong Foo* is inapplicable. (Pet. Brief p. 26) In fact, Rule 29(a) merely enables the Trial Court to order an acquittal without the formality of having the jury return a directed verdict. Rule 29(a) does not substantively change the effect of a Trial Court's action in ordering an acquittal.

In *Jenkins* this Court denied the appealability of an acquittal entered by a Trial Court after a bench

trial. Writing for the Court, Mr. Justice Rehnquist stated:

> "When a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal." 420 U.S. at 365.

In his summary, Mr. Justice Rehnquist indicated the proper result in the instant case when he wrote:

> "In those few cases that have reached this Court where the appellate process was initiated by the Government following a verdict of acquittal, the Court has found the appeal barred by the Double Jeopardy Clause. . . . But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 USC § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." 420 U.S. at 369, 370. (citations omitted).

In *Jenkins* this Court affirmed the Second Circuit's decision dismissing the appeal for lack of jurisdiction. A year after its own decision in *Jenkins,* the Second Circuit decided a case whose determinative issue was identical to that now before this Court: *United States* v. *Suarez,* 505 F.2d 166 (2d Cir. 1974). In a three count indictment, the Government charged Suarez with various drug offenses. The case was tried to a jury. At the close of the Government's case, Suarez moved for Judgments of Acquittal on all three counts pursuant to Rule 29. The Trial Court granted the motion as to only one count. The jury retired and, as in this case, became deadlocked. After the Trial Court declared a mistrial, Suarez renewed his Rule 29 Motions for

Judgment of Acquittal. After the Trial Court had granted the motions, the Government appealed.

The Second Circuit held:

> "There has been a legal determination of innocence on the basis of the facts, adduced at the trial, relating to the general issues of the case, and therefore on the basis of *Jenkins* and the authorities relied upon in the majority opinion, the appeal is dismissed for lack of jurisdiction by virtue of the constitutional ban of the Double Jeopardy Clause." 505 F.2d at 168.

The Government did not appeal the *Suarez* decision although it did appeal the Second Circuit's decision in *Jenkins.* Since 1974, no decision or change in a statute has occurred which would compel a different result than that reached in *Suarez.*

In 1975, the Sixth Circuit agreed with the Second Circuit that Rule 29 Judgments of Acquittal are not appealable. *United States* v. *Robbins,* 510 F.2d 301 (6th Cir. 1975), *cert. denied,* 423 U.S. 1048 (1976). In *Robbins,* after the Government had rested in a jury trial, the Trial Court removed the case from the jury and granted Defendant's Motion of Acquittal pursuant to Rule 29(a). The Sixth Circuit held that the Double Jeopardy Clause forbade a review of the Trial Court's judgment. The Court emphasized that the critical element was that the Trial Court's decision "rested upon evidence introduced by the government at trial, and therefore, no appeal lies from the judgment of acquittal". 510 F.2d at 302.

In *Robbins, Suarez* and the instant case a Trial Court found the respective Defendants not guilty on the basis of the evidence adduced at the trial. The Second, Fifth and Sixth Circuits have agreed that the

Double Jeopardy Clause bars a review of Rule 29 Judgments of Acquittal.

Petitioner cites no case which has allowed an appeal of a Rule 29 Judgment of Acquittal, which occurs during a trial or after a mistrial. It completely ignores *Suarez,* which is identical both in fact and result to the Fifth Circuit's in this case. Without supporting authority, Petitioner asserts that this Court's holding in *United States* v. *Sanford,* 97 S. Ct. 20 (1976) controls this appeal. (Pet. Brief p. 9) Both the Second and Fifth Circuits have held that *Jenkins* is the controlling authority for this fact situation.

The Fifth Circuit in the case at bar distinguished *Sanford* from the instant case:

> "Since the time for a Rule 29(c) motion had apparently long since elapsed in *Sanford,* the case no longer fell into the category of a mistrial followed by a timely acquittal. Rather, the district court's order was simply a pretrial dismissal, and as such was subject to the *Serfass* decision's rule." 534 F.2d at 589.[2]

[2] This Court has effectively distinguished *Sanford* from this case in its most recent opinion, *United States* v. *Sanford,* 97 S.Ct. 20 (1976). This Court held that since *Sanford* was dismissed "after the first trial had ended in a mistrial, but before the retrial of respondents had begun," *Sanford* was controlled by the pre-trial dismissal holding of *Serfass* v. *United States,* 420 U.S. 377 (1975). 97 S. Ct. at 21. Therefore, this Court did not reach the facts here. In its second *Sanford* decision, this Court quoted from *United States* v. *Perez,* 9 Wheat. 579, 580 (1824): "The prisoner has not been convicted or acquitted and may again be put on his defence." Here, both Respondents have been acquitted. The trial terminated with Judgments of Acquittal. (See *Fong Foo, supra* at p. 143, *supra* at p. 4) Thus, the *acquittal,* not *dismissal,* occurred not *pre-trial* or *post-trial* but *during* trial. This Court, in effect, distinguished *Sanford* from this case when it said:

> "The trial of respondents on the indictment terminated not in their favor, but in a mistrial declared, *sua sponte,* by the District Court." 97 S.Ct. at 21.

In addition, *Sanford* differs from this case in the essence of the *Sanford* court's order. In *Sanford,* the court held that assuming the Government's evidence to be correct, the Defendant could not be prosecuted. Thus, the *Sanford* trial court did not review the sufficiency of any evidence in making his decision, but rather, assumed the Government's case to be proven. In the instant case, the Trial Court held that the Government failed to prove its case.

On June 2, 1975, this Court entered its first reversal of the Ninth Circuit's holding in *Sanford.* At that time the Petition for Writ of Certiorari in *United States* v. *Robbins, supra,* was pending before this Court. While holding that *Serfass* v. *United States,* 420 U.S. 377 (1975), controlled the *Sanford* dismissal, this Court at the time denied the Petition for Writ of Certiorari in *Robbins.* This Court's refusal to grant a Writ of Certiorari in *Robbins* while reversing *Sanford* indicates that there may be a difference between a Rule 29 Judgment of Acquittal and a dismissal based on a motion which was not made until months after the Rule 29 time requirements elapsed.

Petitioners also cite *Wilson* and *Serfass* as being important to the determination of this appeal. Both of these cases have distinctly different facts and are of only incidental value to this appeal. *Serfass* established the appealability of a pre-trial dismissal. Chief Justice Burger, writing for the Court, observed that pre-trial dismissals are a review of an indictment's sufficiency in legal terms and are *not based* on evidence adduced at trial. In addition, since jeopardy had not attached, the defendant could not claim the protection of the Double Jeopardy Clause.

Wilson established the appealability of an acquittal after a jury verdict of guilty. The *Wilson* rationale

was that a reversal could reinstate the guilty verdict without a second trial. Therefore, Wilson would not "again be tried for the same offense".

Respondents have not extended this Brief, unduly and unnecessarily, by a detailed discussion of the Petitioner's citations which, for the most part, are completely irrelevant to the issue before this Court. Instead, Respondents have cited and discussed herein only those cases pertinent to the limited issue presented by this appeal.

V. CONCLUSION

Respondents had been put in jeopardy when the trial terminated with the Trial Court's Rule 29 Judgments of Acquittal.

A reversal of those Judgments would require a second trial putting the Respondents in jeopardy again for the same offense.

Petitioner's Brief cites no case in which a Court has allowed an appeal of a Rule 29 Judgment of Acquittal absent a guilty verdict. The Second, Fifth and Sixth Circuits have held that Rule 29 Judgments of Acquittal are not appealable unless there is a guilty verdict.

Critical to and determinative of this Appeal is the fact that the Trial Court, within his power under Rule 29, determined that, in considering all "of the evidence adduced on the trial", the Respondents were *NOT GUILTY*. A reversal of the Trial Court's decision would require further proceedings of factual determinations in contradiction of the express holdings of *Jenkins, Fong Foo, Suarez* and *Robbins* and in violation of the Fifth Amendment to the Constitution of the United States of America.

Respectfully, this Court should affirm the holding of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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